

profit corporation with a principal place of business at 137 Montague St., Ste. 380, Brooklyn, NY 11201-3548. The Conservancy acts as the corporate home and fiscal sponsor for various free and open source software (“FOSS”) projects. The Conservancy also serves as copyright enforcement agent for the owners of rights in and to some of its member projects.

2. Mr. Erik Andersen is a private individual with a residence in Springville, Utah. Mr. Andersen develops, markets, distributes, and licenses computer software in a professional capacity.

3. On information and belief, Westinghouse Digital Electronics, LLC, (“Westinghouse”) is a California limited liability company with its principal place of business at 12150 Mora Drive, Santa Fe Springs, CA 90670.

4. On information and belief, Phoebe Micro, Inc. (“Phoebe Micro”) is a California corporation with its principal place of business at 47606 Kato Road, Fremont, CA 94538.

5. On information and belief, ZyXEL Communications Inc. (“ZyXEL”) is a California corporation with its principal place of business at 1130 North Miller Street, Anaheim, CA 92806-2001.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction over Plaintiffs' claims for copyright infringement pursuant to 17 U.S.C. § 501 and 28 U.S.C. §§ 1331 and 1338(a).

7. This Court has personal jurisdiction over each Defendant pursuant to Rule 4(K)(1)(a) of the Federal Rules of Civil Procedure and §§ 301 and 302 of the New York Civil Practice Law and Rules. On information and belief, each Defendant (i) conducted and continues to conduct

substantial business in the State of New York; (ii) placed its allegedly infringing products into the stream of commerce throughout the United States with the expectation that they will be used by consumers in this judicial district, which products and services have been offered for sale and used in New York and this judicial district; (iii) caused infringement to occur and continue to occur in New York and in this judicial district; (iv) contracts to supply goods and services and/or maintains offices within this judicial district; or, (v) owns or operates websites for the purposes of distributing infringing electronic products or directly marketing, selling and supporting various physical products to people in and residents of New York and in this judicial district.

8. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391(b), (c) and 1400(a) because a substantial part of the events giving rise to the claims asserted herein arise in this district, and each Defendant, on information and belief, is and at all times was doing business in this district.

FACTUAL BACKGROUND

9. Mr. Andersen is the author and developer of the BusyBox computer program, and the owner of copyrights in that computer program. BusyBox is a single computer program that comprises a set of computing tools and optimizes them for computers with limited resources, such as cell phones, PDAs, and other small, specialized electronic devices. BusyBox is extremely customizable, fast, and flexible, and, on information and belief, is used in countless products sold by many manufacturers all over the world.

10. Mr. Andersen has registered and applied for registration of several of his copyrights in BusyBox. *See, e.g.*, “BusyBox, v.0.60.3.”, Copyright Reg. No. TX0006869051 (October 2,

2008); "BusyBox, version 1.00", Copyright Reg No. TX0007412131 (September 2011); "BusyBox, version 1.00-pre1" (Claim 1-654604812 filed on 8/30/2011); "BusyBox, version 1.00-pre2" (Claim 1-655039228 filed on 8/31/2011); "BusyBox, version 1.00-pre3" (Claim 1-655044385 filed on 8/31/2011); "BusyBox, version 1.00-pre4" (Claim 1-655091784 filed on 8/31/2011); "BusyBox, version 1.00-pre5" (Claim 1-655603152 filed on 9/1/2011); "BusyBox, version 1.00-pre6" (Claim 1-655691236 filed on 9/1/2011); "BusyBox, version 1.00-pre8" (Claim 1-657538342 filed on 9/6/2011); "BusyBox, version 1.00-pre9" (Claim 1-657538446 filed on 9/6/2011); and, "BusyBox, version 1.00-rc1" (Claim 1-657538539 filed 9/6/2011).

11. Plaintiff Software Freedom Conservancy is a 501(c)(3) tax-exempt public charity comprised of many FOSS projects. In addition to being the fiscal sponsor of its member projects, the Conservancy also serves as copyright enforcement agent for some owners of copyrights in the member projects. BusyBox is a project of the Software Freedom Conservancy, which also acts as copyright enforcement agent for Mr. Andersen with respect to BusyBox.

12. Mr. Andersen has distributed BusyBox since on or about November 4, 1999. He distributes BusyBox in source code form, the human-readable form of a computer program that a programmer must have in order to make changes to the program. Mr. Andersen distributes BusyBox under a copyright license entitled the "GNU General Public License, Version 2" ("the License"). A copy of the License is attached to this Complaint as Exhibit A.

13. Under the License, Mr. Andersen grants certain permissions to other parties to copy, modify and redistribute BusyBox so long as those parties satisfy certain conditions. In particular, Section 2(b) of the License, addressing each Licensee, states:

You must cause any work that you distribute or publish, that in whole or in part contains or is derived from the Program or any part thereof, to be licensed as a whole at no charge to all third parties under the terms of this License.

Thus, if a Licensee redistributes a version of BusyBox, it may do so only under the terms of the License. Distribution of BusyBox under any other terms or conditions is not allowed.

14. The object code or executable form of a computer program is the form that can actually be run on a computer, but which is not intelligible to the human reader and thus is not practicably modifiable. The License permits a Licensee to distribute BusyBox in object code or executable form on the condition that the Licensee gives recipients access to the source code corresponding to the version of BusyBox they are distributing in object code or executable form.

Specifically, section 3 of the License states:

You may copy and distribute the Program (or a work based on it, under Section 2) in object code or executable form under the terms of Sections 1 and 2 above provided that you also do one of the following:

- a) Accompany it with the complete corresponding machine-readable source code, which must be distributed under the terms of Sections 1 and 2 above on a medium customarily used for software interchange; or,
- b) Accompany it with a written offer, valid for at least three years, to give any third party, for a charge no more than your cost of physically performing source distribution, a complete machine-readable copy of the corresponding source code, to be distributed under the terms of Sections 1 and 2 above on a medium customarily used for software interchange

Thus, to comply with the License, when a party distributes an object code or executable form of BusyBox, they must include either (i) the “complete corresponding machine-readable source code” or (ii) a “written offer ... to give any third party ... a complete machine-readable copy of the corresponding source code.” If a distributor fails to do this, they are not fulfilling the terms

of the license and, thus, that distribution is not made with Mr. Andersen's permission.

15. Plaintiffs have at no time granted any permission to any party to copy, modify, or distribute BusyBox under any terms other than those of the License. Plaintiffs do not permit anyone to distribute BusyBox except in compliance with the License.

16. On information and belief, each Defendant sells electronic products, such as high definition televisions, video cameras, wireless routers, etc., that contain embedded executable forms of software, called "firmware," or offers electronic versions of firmware for download via their website. On information and belief, each Defendant has distributed firmware – embedded in electronic products or by itself – that contains BusyBox or a derivative work of BusyBox. Each Defendant is required to have Plaintiffs' permission to make such distributions. The only such permission available for BusyBox is the contingent one granted under the License.

17. On information and belief, each Defendant has distributed BusyBox within firmware – embedded in electronic products or by itself – in a manner that does not comply with the License. Such firmware includes that for: Westinghouse's TX-52F480S LCD HDTV; Phoebe Micro's Airlink101 AR670W and AR690W wireless routers, Airlink101 AICAP650W IP Motion Wireless Camera and AICAP650, AICN500, AICN500W, AICN600W, AICN747W, AICN777W, ANAS350, AP671W, AR360W3G, AR525W, AR570W, AR660W3G, AR675W and AR680W products; and, ZyXEL's P-663H-51 ADSL 2+ Bonded 4 Port Router and DMA-2500, FSG2200HNU, GS1500-24P, GS1510-16, GS1510-24, MWR222, NS320, NSA-220 Plus, NSA-2401, NSA210, NSA221, P-2601HN-F1, P-2601HNL-F1, P-2812HNU-51c, P-3202H-Bb, P-330W, P-870H-51a v2, P-870HW-51a_v2, P663HN-51 and ZYWALL USG 200 products. Each

Defendant has therefore made and, on information and belief, continues to make distributions of BusyBox without Plaintiff's permission.

18. In addition, under the License, any party that redistributes BusyBox in a manner that does not comply with the License immediately and automatically loses all rights granted under the License to copy and modify BusyBox. Specifically, section 4 of the License states:

You may not copy, modify, sublicense, or distribute the Program except as expressly provided under this License. Any attempt otherwise to copy, modify, sublicense or distribute the Program is void, and will automatically terminate your rights under this License.

Thus, once each Defendant made a distribution that did not comply with the License, that Defendant lost any and all right to copy, modify, or distribute BusyBox. Any copying, modification, or distribution of BusyBox after that time by each Defendant was and is without Plaintiffs' permission.

19. Prior to the filing of this complaint, Plaintiffs notified each Defendant of its unlawful conduct in writing. Each Defendant has either ignored or refused to meaningfully respond to Plaintiffs and, on information and belief, continues to copy, modify or distribute BusyBox in violation of Plaintiffs' exclusive rights under the Copyright Act. Because each Defendant was aware of its infringing activities from at least the date it received written notice from Plaintiffs, any copying, modification, or distribution of BusyBox after at least the date each Defendant received such notice was and is willful.

CLAIM FOR RELIEF
COUNT I- COPYRIGHT INFRINGEMENT

20. Plaintiffs reallege and restate paragraphs 1 through 19 as if more fully set forth

herein.

21. Mr. Andersen is, and at all relevant times has been, a copyright owner under United States copyright law in the FOSS software program known as BusyBox. His copyright registrations for BusyBox include: “BusyBox, v.0.60.3.”, Copyright Reg. No. TX0006869051 (10/2/2008); and, “BusyBox, version 1.00”, Copyright Reg No. TX0007412131 (September 2011). His pending applications for copyright registration of additional versions of BusyBox include: “BusyBox, version 1.00-pre1” (Claim 1-654604812 filed on 8/30/2011); “BusyBox, version 1.00-pre2” (Claim 1-655039228 filed on 8/31/2011); “BusyBox, version 1.00-pre3” (Claim 1-655044385 filed on 8/31/2011); “BusyBox, version 1.00-pre4” (Claim 1-655091784 filed on 8/31/2011); “BusyBox, version 1.00-pre5” (Claim 1-655603152 filed on 9/1/2011); “BusyBox, version 1.00-pre6” (Claim 1-655691236 filed on 9/1/2011); “BusyBox, version 1.00-pre8” (Claim 1-657538342 filed on 9/6/2011); “BusyBox, version 1.00-pre9” (Claim 1-657538446 filed on 9/6/2011); and, “BusyBox, version 1.00-rc1” (Claim 1-657538539 filed 9/6/2011). Plaintiff Software Freedom Conservancy is the corporate home for the BusyBox project and the designated copyright enforcement agent for Mr. Andersen with respect to BusyBox.

22. Each Defendant's distribution of products or firmware that contain BusyBox without approval or authorization by Plaintiffs infringes each of Plaintiffs' exclusive copyrights in BusyBox pursuant to 17 U.S.C. § 501.

23. Plaintiffs are entitled to recover from each Defendant for infringement of each copyright as of its date of registration either (i) the amount of Plaintiffs' actual damages and any additional profits of each Defendant incurred as a result of the infringement or (ii) statutory

damages. 17 U.S.C. § 504.

24. For each copyright, Plaintiffs are also entitled to permanent injunctive relief pursuant to 17 U.S.C. § 502 because Plaintiffs have no adequate remedy at law for each Defendant's wrongful conduct because, among other things, (a) Plaintiffs' copyrights are unique and valuable property whose market value is impossible to assess, thus causing irreparable harm, (b) each Defendant's infringement harms Plaintiffs such that Plaintiffs could not be made whole by any monetary award, and (c) each Defendant's wrongful conduct, and the resulting damage to Plaintiffs, is continuing.

25. As of each copyright's registration, Plaintiffs are also entitled to an order impounding any and all infringing materials pursuant to 17 U.S.C. § 503 and to recover their attorneys' fees and costs of suit pursuant to 17 U.S.C. § 505.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request judgment against each Defendant as follows:

(1) That the Court issue injunctive relief against each Defendant, and that each Defendant, its directors, principals, officers, agents, representatives, servants, employees, attorneys, successors and assigns, and all others in active concert or participation with each Defendant, be enjoined and restrained from copying, modifying, distributing or making any other infringing use of Plaintiffs' software.

(2) That the Court order each Defendant to pay Plaintiffs' actual and consequential damages incurred or statutory damages;

(3) That the Court order each Defendant to account for and disgorge to Plaintiffs all profits derived from its unlawful acts;

(4) That the Court order each Defendant to pay Plaintiffs' litigation expenses, including reasonable attorneys' fees and costs of this action; and

(5) That the Court grant Plaintiffs any such further relief as the Court may deem just and proper.

Dated: Nov. 10, 2011
New York, New York

Respectfully submitted,

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EXHIBIT A

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- c) Accompany it with the information you received as to the offer to distribute corresponding source code. (This alternative is allowed only for noncommercial distribution and only if you received the program in object code or executable form with such an offer, in accord with Subsection b above.)

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